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APR 6 1960
JAMES R. BROWNING, Clerk

No. 761 and No. 823, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIS W. RITTER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
PETITIONER

v.

UNITED STATES OF AMERICA

WILLIS W. RITTER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
PETITIONER

v.

THE HONORABLE ALFRED P. MURRAH, CHIEF JUDGE, THE HONORABLE JOHN C. PICKETT, CIRCUIT JUDGE, THE HONORABLE DAVID T. LEWIS, CIRCUIT JUDGE, AND THE HONORABLE JEAN S. BREITENSTEIN, CIRCUIT JUDGE, CONSTITUTING THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND ON MOTION FOR LEAVE TO FILE AND PETITION FOR WRIT OF CERTIORARI OR ALTERNATIVELY FOR WRIT OF MANDAMUS, TO THE CIRCUIT JUDGES CONSTITUTING THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION [1]

The question presented by this case is whether a court of appeals, having determined that a district

[1] Pursuant to a request issued through Chief Judge Alfred P. Murrah, the undersigned counsel represent the Judges

judge is not capable of conducting "a fair and impartial trial" of a particular cause and that "the proper administration of justice requires that further proceedings in the case be heard before another judge", has the supervisory power to direct that such further proceedings "be heard before a judge to be designated by the Chief Judge" of the Circuit (Pet., No. 761, p. 3a). In our view, the decisions of this Court plainly show that such power resides in the courts of appeals and there is accordingly no occasion for review by this Court. If, as we believe, there is no serious question on this score, the question raised in No. 823, Misc.—whether the Judicial Council of the Circuit acted within its powers when it confirmed this disposition and entered a similar order—becomes wholly academic.

The history of the proceedings in this case may be briefly summarized:

(1) Eight families of Navajo Indians brought suit in the United States District Court for the District of Utah claiming damages under the Federal Tort Claims Act for destruction of their horses by agents of the Federal Government. The District Court (Chief Judge Ritter) held the United States liable and allowed damages of $100,000. On appeal, the Court of Appeals reversed (220 F. 2d 666) on the ground that the Utah abandoned horse statute (Utah

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constituting the Judicial Council of the Tenth Circuit of the United States, named as respondents in No. 823, Misc., as well as the United States of America, respondent in No. 761.

Code Ann., 1953, 47-2) was properly invoked by the government agents. This Court granted certiorari and reversed the Court of Appeals' holding that the United States was not liable. *Hatahley* v. *United States*, 351 U. S. 173. In its opinion, this Court stated (p. 182), with reference to damages, that the District Court had "merely awarded the amount prayed for in the complaint" and that the findings were "totally inadequate for review." The case was accordingly remanded to the District Court.

(2) Following remand, a further hearing took place before Judge Ritter. Testimony was presented and findings of fact and conclusions of law were entered. The court, on this occasion, awarded damages aggregating approximately $186,000. The United States appealed, contending that numerous errors had been committed, that it had not been accorded a fair and impartial consideration of the issue of damages, and that the case should be remanded for a new trial before a different judge. The Court of Appeals, considering the case *en banc*, unanimously found that the award was not justified by the evidence and findings, and it directed a new trial on the question of damages. 257 F. 2d 920. In its opinion, the court stated (p. 926):

> * * * From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration

which is necessary for a fair disposition of this unfortunate matter, and he should step aside.

* * * * *

Somewhat in analogy to the procedure outlined in Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, and Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11, we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See La Buy v. Howes Leather Co., 352 U.S. 249, 259, 77 S.Ct. 309, 1 L. Ed. 2d 290.

A petition for certiorari was filed by the plaintiffs in which the first question presented was whether, in the circumstances, the Court of Appeals "was justified in directing the district judge to withdraw from the case" (Pet., No. 420, Oct. Term, 1958, p. 2). This Court denied the writ, 358 U. S. 899.

(3) Upon remand of the case for the second time, the plaintiffs petitioned for appointment of a special master (or a commission of special masters). The United States opposed this request and moved Judge Ritter to transfer the proceedings to another judge. Judge Ritter denied both the petition for reference to a special master and the Government's motion for the transfer of the cause to another judge.

(4) The Government thereupon applied to the Court of Appeals for a writ of mandamus or prohibition. The case was again heard *en banc* and again decided unanimously. The opinion stated (Pet., No. 761, pp. 3a-4a):

> In view of the whole record before this court, we are convinced that the United States cannot obtain a fair and impartial trial before the presently presiding judge, and that the proper administration of justice requires that further proceedings in the case be heard before another judge. And, it now conclusively appears that the said respondent judge will not heed the court's suggestions that he take proper steps to excuse himself and reassign the case. It is therefore ordered that further proceedings in this case be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further action herein. * * *

Immediately after consideration by the Court of Appeals, the matter was further considered by the Judicial Council of the Tenth Circuit, convened pursuant to 28 U. S. C. 332.[2] The order of the Council found (Pet., No. 823, Misc., p. 2a) that Judge Ritter has "such bias and prejudice * * * that he should proceed no further" in the case, and that the "effective and expeditious administration of the business" of the District Court requires that the matter be heard by another judge. The order of the Council directs (*id.*, p. 3a) that Judge Ritter proceed no further in the case, and it requests the Chief Judge of

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[2] That provision states in pertinent part:

"* * * Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

the Circuit to designate and assign another judge from the District Court's bench.

The applications now before this Court challenge the actions taken by the Court of Appeals and by the Judicial Council.

The writ of mandamus is, of course, the historic means by which an appellate court compels compliance with its directions. *United States* v. *Fossatt*, 21 How. 445, 446; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255-256; *In re Potts, Petitioner*, 166 U.S. 263, 265; *Ex parte The Union Steamboat Company*, 178 U.S. 317, 318-319.[3] In a previous application for certiorari, denied in the 1958 Term, petitioners challenged the Court of Appeals' conclusion that the case could not be heard impartially by Judge Ritter and that he should withdraw. Certainly, there is no occasion for this Court to review, at this time, the record which convinced the judges of the Court of Appeals that the proper administration of justice would be served by transfer of the case to another judge. Nor can there be the slightest room for doubt that a determination of this kind is within the supervisory powers of the appellate courts of the United

[3] Courts of appeals have similarly exercised this power. *Osage Oil & Refining Co.* v. *Continental Oil Co.*, 34 F. 2d 585, 587-588 (C.A. 10); *In re N. V. Zuid-Hollandsche Scheepvaart, Etc.*, 64 F. 2d 915 (C.A. 5); *In re Chicago, R. I. & P. Ry. Co.*, 162 F. 2d 257, 258 (C.A. 7); *Federal Home Loan Bank of San Francisco* v. *Hall*, 225 F. 2d 349, 385-386 (C.A. 9), certiorari denied *sub nom. Mallonee et al.* v. *Federal Home Loan Bank of San Francisco et al.*, 350 U.S. 968; *United States* v. *United States District Court*, 272 Fed. 611, 614-615 (C.A. 9).

States. In *Calvaresi* v. *United States*, 348 U. S. 961, and *Smaldone* v. *United States*, 348 U. S. 961, cases which involved a claim by criminal defendants that the District Judge had shown himself incapable of conducting their trials impartially, this Court entered a *per curiam* order reading as follows: "In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge." See, also, *Cooke* v. *United States*, 267 U. S. 517; *Offutt* v. *United States*, 348 U. S. 11. It needs no argument that the courts of appeals, which have the primary responsibility for reviewing the conduct of proceedings in the district courts, have supervisory powers of equal breadth.

Since we believe it clear under settled principles that the Court of Appeals acted within the range of its powers and responsibilities, there is no occasion for considering the prerogatives of the Judicial Council or the modes by which review of its orders might be sought. The order of the Judicial Council required no more than what was already required by the order of the Court of Appeals. We note additionally our belief that the Judicial Council's order in this case falls squarely within its statutory authority (28 U.S.C. 332) to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." As we show in the Appendix, *infra*, by pertinent excerpts from the legislative history, Congress conferred upon the

Judicial Council of each circuit extensive supervisory powers in such matters as the assignment of judges.

The petition in No. 761 and the application in No. 823, Misc., should be denied.

Respectfully submitted,

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APRIL 1960.

APPENDIX

The legislative history of the bills (S. 188, H.R. 2973 and H.R. 5999, 76th Cong., 1st Sess. (1939)) which resulted in the statute upon which 28 U.S.C. 332 is based, includes the following material:

Chief Judge Groner stated (Hearings, Subcommittee of the Committee on the Judiciary, United States Senate, 76th Cong., 1st Sess. (1939), on S. 188, pp. 11, 14):

> Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.
>
> The bill also provides what is not now true, that it shall be the duty of the district judges, when admonished or when matters otherwise brought to his attention by the judicial council, to take whatever steps are thought to be necessary *or declared to be necessary* to correct those things which ought to not exist in a well-run judicial system.
>
> * * * *
>
> I know that it may be said to be an acknowledgement by the courts of the necessity of which I spoke in the beginning of my remarks, the duty and responsibility upon themselves of protecting themselves against the criticism or against those things which produce criticism. To that extent, it impinges upon what in the very beginning of things was considered to be the independence of

> the courts. At the present time a circuit judge or district judge is responsible to his conscience. *This bill does impose some sort of instrumentality whereby, if his conscience is not sufficiently quickened, it may be quickened by some action on the part of the judicial council.*
>
> It is not, I think, an unfair or an unwise impingement on the independence of the courts. I think the very necessities of the the work, the strengthening of confidence on the part of the people is the first essential, and anything which properly provides for and leads to the accomplishment of that purpose, I am for. I think it goes far enough and not too far in that direction. * * * [1]

The Honorable Arthur T. Vanderbilt, referred to as the "former President of the American Bar Association and President of the American Judicature Society", stated at those same hearings (*id.* p. 16):

> Secondly, I would like to point out that the present bill has a great advantage over the bill that was introduced last year, and for that I think the credit must go to the Chief Justice and the other members of the Supreme Court, in that it does not attempt to centralize all the business affairs of the Federal courts in Washington, but rather creates a system of decentralization in *recognizing the circuit courts of appeals*, 11 of them, including the Court of Appeals of the District of Columbia, *as the operating units in bringing about the proper administration of justice.* This bill has at least that very great advantage that, the circuit judges being responsible for the con-

[1] Emphasis here, and elsewhere in this Appendix, has been supplied.

> dition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. I think the principle or example set there is one which is very important and will be very helpful in the administration of the bill.

Mr. Vanderbilt expressed the view that the bill "does have teeth in it" (*ibid.*, p. 18). In discussing the power to assign judges from another district, Mr. Vanderbilt stated (p. 19):

> If a judge having assistance given him will not work, *and will not respect the admonition of the circuit judges*, then something else will have to be done. Those cases are so rare that I do not think you [members of a committee of Congress] will ever have to bother with them.

The Honorable Kimbrough Stone, Senior Circuit Judge, Eighth Judicial Circuit, also made a statement in which he noted the "necessity of some authority" in the circuit judges adequate to supervise the district judges, and he apparently thought that the bill under consideration would supply the need. *Id*, p. 26.

Similarly, Judge Alexander Holtzoff, then Special Assistant to the Attorney General, noted at the Senate hearings (p. 36):

> This bill will create an administrative machinery composed of two parts. First, it proposes to establish an administrative office in Washington, with a director in charge who will devote his entire time to administrative work, to gathering information in the States, formu-

lating suggestions as to improving the efficiency of the courts, and devising ways and means for expediting disposition of the cases on the dockets. He is not clothed with any authority to give any directions to the judges. All he can and must do is to gather information and formulate suggestions. *The governing body under this bill will be the judicial council in each circuit,* and for that purpose the District of Columbia is a circuit. The judicial council is composed of the circuit judges of each circuit. The director is to submit quarterly reports to each judicial council, *which can take such action as appears to be necessary.*

There is a mandatory clause in the bill requiring the district judges to accept and follow the directions of the judicial council. To this extent they are responsible for the administrative side of the Federal judiciary *and for dispatching the work of the courts in a businesslike manner and expediting the decision of cases.*

Thus, while the work of the director is administrative in nature, the judicial council "can take such action as appears to be necessary". *Ibid.*

Representative Walter Chandler of Tennessee, a member of the House Committee on the Judiciary, stated, *inter alia*, 84 Cong. Rec., pt. 9, p. 9310 (1939):

Another purpose of the bill is to secure an improved supervision of the work of the Federal courts through an organization under judicial control [i.e., the Judicial Council]. The data assembled by the director and submitted quarterly to the courts of appeals is the subject of study by a council of judges in each circuit

to be held semiannually, and directions are to be given to the district judges "as to the administration of the business of their respective courts."

After pointing out how the bill will produce more efficient and economical administration of justice and how the plan has worked elsewhere, Mr. Chandler concluded as follows (*id.*):

> *To those who have expressed apprehension "as to the safety of entrusting great powers to isolated judges, subject to no check except appeal according to law, and subject to suspicion in spite of good conduct and wise decisions," this bill should be a welcome answer.* Indeed, it is my own hope that, out of the investigations of the administrative office, and the deliberations of the conferences provided for in the bill, there will arise the sense of unfailing obligation resting on our judiciary to promote and abide by the highest ethical standards of which the bench and bar of America are capable, and as are reflected in the established canons of judicial and professional ethics.

In view of petitioner's inclusion of remarks by the late Honorable John J. Parker, Senior Judge, United States Court of Appeals for the Fourth Circuit (No. 823, Misc. Pet. 9-10), we invite attention to additional statements by Judge Parker. Thus, he thought that the formation of the judicial councils would give the directions of the senior circuit judge serving as chief judge much greater force and effect. He stated (Hearings, House Judiciary Committee, 76th Cong., 1st Sess. (1939), on H.R. 2973 and H.R. 5999, p. 21): "In other words, you would have a man speaking with authority of law and not merely exercising

his personal and persuasive influence." Judge Parker went on to state, in language which is particularly pertinent with respect to the instant petitions (*id.*):

> I think that that provision for a council in each circuit is one of the best provisions in the bill, in that it will centralize the responsibility in the circuit judges, and will give the circuit judges the power to utilize the judicial man power on each circuit to the best advantage.
>
> The senior circuit judge now has the power to assign judges from one district to another within his circuit. He would never fail to exercise that power, if a council of his brethren advised him that it should be exercised to relieve the conditions in a particular district.

Further contrasting the existing situation with that which would exist after enactment of the bill, Judge Parker stated (*id.*):

> * * * We have given to the Circuit Court of Appeals supervisory power over the decisions of the district judges, but we have given them no power whatever over administration by the district judges.
>
> If Judge Jones decides a case contrary to the views of the majority of the Circuit Court of Appeals, we can tell him so and reverse him. But if he holds a case under advisement for 2 years, instead of deciding it promptly, there is nothing that we are authorized by the law to do about it in the absence of an application for mandamus. Now, *this authorizes us to do something about it*; and I agree with you that something ought to be done about it.

Nor did Judge Parker think the council was limited to questions of delay. After noting that the council would see to it that "the cases are promptly decided", he went on to state (*id.*): "* * * and not only that, but they [the council] are going to tell the judges, or give the judges advice, about other matters that we could not foresee to legislate about in this bill." Judge Parker also expressed the view that "This counsel [council] can deal with *all sorts of questions* that arise in the administration of justice." (*Id.*, at p. 22).

The following colloquy then appears (*id.*):

> Mr. Celler. Do you put any restraint on the council at all?
>
> Judge Parker. I do not think this bill does. Of course, I assume this is true: That the council will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.
>
> The Chairman [Representative Hatton W. Sumners of Texas]. Then you are limited by what you can do to a judge in the way of punishment?
>
> Judge Parker. Absolutely, Mr. Chairman.
>
> The Chairman. There is another method of getting things over among people by advice and suggestion; in other words, you are a part of the family, for instance.

It is at this point that the excerpt which the petitioner quotes appears (No. 823, Misc., Pet. 9-10).

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 545265 1262